In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 434

JOSEPH P. BRYANT, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 13-16) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on June 3, 1952 (R. 16). The time for filing a petition for a writ of certiorari was extended to November 1, 1952 (R. 16-17). The petition was filed on November 1, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1255 (1).

QUESTION PRESENTED

Whether a civil service employee, separated in compliance with Sec. 6 of the Act of August 24, 1912, 5 U.S.C. 652, *infra,* is entitled to compensation for the period of separation where a criminal prosecution based upon charges leading to his separation results in his acquittal and he is ultimately reinstated in the postal service.

STATUTE INVOLVED

Section 6 of the Act of August 24, 1912, c. 389, 37 Stat. 555, 5 U.S.C. 652, provides in pertinent part as follows: [1]

> That no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; and copies of charges, notice of hearing, answer, reasons for removal, and of the order of removal shall be made a part of the records of the proper department or office, * * *.

[1] The applicable regulation of the Civil Service Commission follows the form and substance of the statute and is found at 5 C.F.R., 1946 Supp., 27.12.

STATEMENT

Petitioner, Joseph P. Bryant, Jr., a classified civil service employee, commenced this action in the Court of Claims to recover damages in the form of unpaid salary covering a period of suspension and removal from his employment as a postal clerk at a Post Office sub-station in Cleveland, Ohio; in addition, he sought redress for the alleged "deprivation of the opportunity to be advanced in the Postal Service of the United States to a position of trust." (R. 1) The complaint alleged that his suspension and removal from his job were wrongful and the result of a conspiracy between his co-workers and a postal inspector to procure his discharge. He contends that the charges leading to his dismissal were the result of false and malicious statements by his co-workers, and that the failure of responsible officials to conduct an adequate investigation of the charges renders the action in discharging him arbitrary and an abuse of their discretionary powers. The Court of Claims found that petitioner's dismissal was accomplished in compliance with the procedural requirements of 5 U.S.C. 652, *supra*, p. 2, and that the charge of arbitrary action and abuse of discretion was not sustained by the facts of the record (R. 15).

Petitioner first entered the Postal Service in 1927 (Fdg. 1, R. 10). On October 15, 1946, while on duty as a "window clerk" at a Cleveland substation, he was contacted by postal inspectors and by them charged with demanding and receiving,

on October 15, 1946, a rate of postage in excess of the rate provided by law, on two parcels presented for mailing (Fdg. 2, R. 10) by persons acting at the instance of postal inspectors. Petitioner denied that he had deliberately charged more than the authorized rate and stated that he had no explanation to offer for the discrepancies in the amounts charged and the value of the stamps actually placed on the parcels. He was suspended from further duty on that date (Fdg. 2, R. 10).

On October 17, 1946, the postal inspectors served petitioner with written charges detailing the alleged over-charges and stating that the petitioner was allowed five days in which to answer the charges in writing and submit affidavits relating to his answer. On October 22, 1946, petitioner formally denied the charges under oath (Fdg. 3, R. 10-11).

On the same date that petitioner was notified of the charges, a warrant for his arrest was issued; bond was furnished and a hearing fixed for October 25. The hearing was held as scheduled; on November 20 an information was filed and, based upon the excessive charges of October 15, petitioner was charged in two counts with violation of 18 U.S.C. Section 330 (Fdg. 4, R. 2, 11-12). Petitioner was tried on April 14 and 15, 1947, on these charges and was acquitted (Fdg. 4, 5, R. 11-12).

On November 12, 1946, the First Assistant Postmaster General had advised the Postmaster at

Cleveland that after consideration of the evidence submitted it had been decided that petitioner should no longer be retained in the Postal Service and directed that petitioner's dismissal be effected. The separation was accomplished on November 15, 1946 (Fdg. 5, R. 12). Following his acquittal of the criminal charge, petitioner, on May 1, 1947, wrote the Cleveland Postmaster and requested restoration in the Postal Service. The letter was transmitted to the First Assistant Postmaster General who then advised petitioner on May 19, 1947, that: "In view of the nature of the charges which resulted in your separation from the service, it is deemed inadvisable to take any action looking to your reinstatement to a position in the postal service." (Fdg. 6, R. 12).

Subsequently, on September 26, 1947, the First Assistant Postmaster General advised the Cleveland Postmaster that after further consideration of petitioner's case it was felt that he had been sufficiently punished. He requested that certain personnel forms and a fingerprint chart be submitted for further transmittal to the Civil Service Commission with a view toward petitioner's reinstatement, subject, however, to the proviso that if and when reinstatement were authorized petitioner was not to be given an assignment where he would handle financial transactions at any time (Fdg. 7, R. 12). This action resulted in petitioner's reinstatement in the Postal Service at Cleveland on January 3, 1948. He is presently assigned as an

employee in the Los Angeles Post Office; in that assignment he has been on "window duty" and has handled Government funds (Fdg. 7, R. 12-13).

ARGUMENT

Petitioner was given written notice of the charges against him, and a reasonable time in which to answer the charges in writing and to submit affidavits in support of his answer. He availed himself of his statutory rights, and his separation was directed only after deliberative consideration of the charges and evidence against him by competent administrative authority. Manifestly, the separation was accomplished in full compliance with the procedural requisites of Section 6 of the Act of August 24, 1912, c. 389, 37 Stat. 555, 5 U.S.C. 652, *supra*, pp. 2-3, applicable to removals of classified civil service employees.[2] At this point judicial review ceases, for the only possible remaining inquiry is whether the removal was "for such cause as will promote the efficiency of the service" (5 U.S.C. 652, *supra*, p. 2). It has long been settled that courts will not interfere, even with the advantage of hindsight, with an administrative determination as to the existence of cause for removal, involving matters of judgment and discretion, unless it palpably appears that the action was so arbitrary or capricious as to compel

[2] Subsequent to petitioner's removal and reinstatement, 5 U.S.C. 652 was amended by the Act of June 10, 1948, c. 447, 62 Stat. 354, to provide payment of compensation covering periods of separation to civil service employees who have been reinstated on the ground that their removal or suspension was unjustified or unwarranted.

an inference that the removal was prompted by malice. The cases supporting this principle are legion: *Decatur* v. *Paulding*, 14 Pet. 497; *Keim* v. *United States*, 177 U.S. 290; *Eberlein* v. *United States*, 257 U.S. 82; *White* v. *Berry*, 171 U.S. 366; *Carter* v. *Forrestal*, 175 F. 2d 364 (C.A.D.C.); *Siskind* v. *Morgenthau*, 152 F. 2d 286 (C.A.D.C.); *Hammond* v. *Hull*, 131 F. 2d 23 (C.A.D.C.), certiorari denied, 318 U.S. 777; *Love* v. *United States*, 108 F. 2d 43 (C.A. 8), certiorari denied, 309 U.S. 673; *Levine* v. *Farley*, 107 F. 2d 186 (C.A.D.C.), certiorari denied, 308 U.S. 622. The Court of Claims found that petitioner's allegation of arbitrary and capricious action motivated by malice was not sustained, and the record is devoid of evidence supporting the charge. Accordingly, the principle above referred to and the cited decisions are dispositive of the case.

Even if the determination of the administrative authority as to the existence of cause were open to judicial review, the evidence fully justified the conclusion reached. The petitioner, at the time of his original suspension, occupied a position of trust in the postal service requiring unimpeachable honesty and integrity. On two occasions on the same day he allegedly charged excessive rates on parcels presented for mailing. He offered no explanation for the discrepancies. That such action rendered his conduct suspect is hardly open to serious doubt. His suspension and subsequent separation, based upon these charges, were fully justified and, even in retrospect, clearly preclude

any inference that the responsible officials acted arbitrarily or capriciously.

The petitioner's subsequent acquittal of the criminal charges based upon the same incidents which resulted in his dismissal in no way militates against this conclusion. The considerations involved in a criminal prosecution and those involved in an administrative determination as to the fitness of an employee for retention in the government service are necessarily dissimilar. In a criminal prosecution the burden of proving the guilt of the accused beyond a reasonable doubt is much more stringent than in a civil suit or an administrative determination of an employee's fitness (*United States* v. *Real Estate Boards*, 339 U.S. 485, 493; *Helvering* v. *Mitchell*, 303 U.S. 391, 397); an acquittal is "merely * * * an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused." *Lewis* v. *Frick*, 233 U.S. 291, 302. Neither the subsequent adjudication of the employee's innocence of criminal charges, nor his subsequent reinstatement, operated retroactively to invalidate the removing authority's prior determination that at the time and in the circumstances such cause existed as warranted separation. *Eberlein* v. *United States*, 257 U.S. 82.[3]

It is sheer cavil to suggest (R. 3) that the pre-

[3] For similar reasons, the Court of Claims did not err in excluding the proffered Transcript of Testimony of the criminal proceeding. That testimony, given subsequent to petitioner's dismissal, could not establish that, on the evidence available at the time of dismissal, such action was unwarranted.

sumption of innocence attending criminal accusations required that petitioner be retained in his position until such time as a jury passed upon his innocence or guilt of the charges. So to circumscribe the otherwise discretionary power of administrative officials to pass upon the fitness of employees would be to reduce their authority to impotency and result in an unwarranted peril to the public interest.

The somewhat nebulous assertion that petitioner is entitled to damages "by way of deprivation of the opportunity to be advanced in the Postal Service of the United States to a position of trust" (R. 1) is equally without merit. It is apparently predicated upon the condition, attached to petitioner's reinstatement (Fdg. 7, R. 12), that he not be given an assignment where he would handle financial transactions at any time. Not only did the Court of Claims find that petitioner, since his reinstatement, has been on "window duty" and "has worked money orders" (Fdg. 7, R. 12-13), but such a proposition can only rest upon the asserted illegality of the original suspension and separation. Since, as has been pointed out, petitioner's removal was in compliance with law, there was no obligation to restore him to service. An election to do so, being an exercise of discretion, may be accompanied by such reasonable conditions as those authorizing the restoration see fit to impose. *Friedman* v. *Schwellenbach*, 159 F. 2d 22, 24 (C.A.D.C.).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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